Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

ROBERT A. HIRSCHFELD
Petitioner
v.
JANET NAPOLITANO
Attorney General of the State of Arizona

and
JOSEPH ARPAIO
Sheriff, Maricopa County, Arizona,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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August 4, 1999

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QUESTIONS PRESENTED

1. Is Arizona Rule of Criminal Procedure 33.1, to the extent that it criminalizes *"wilfully contumacious conduct ... which lessens the dignity and authority of the court"* unconstitutionally vague or overbroad?

2. Does imposition of *any* incarceration upon an attorney for aggressively exercising First Amendment rights, or zealously pursuing client discovery duties, *solely because that exercise is within, rather than outside the environs of a courthouse*, offend Amendment 8, United States Constitution?

LIST OF PARTIES

The State of Arizona is one of the United States of America. Arizona is nominally represented by its Attorney General, Janet Napolitano. (Napolitano became Attorney General after the bulk of this litigation had been conducted by her predecessor, Grant Woods). The underlying Habeas Corpus action seeks to declare unconstitutional a Rule of Criminal Court Procedure promulgated by the Arizona Supreme Court, with which the Arizona Legislature had no involvement.

Respondent Joseph Arpaio is Sheriff of Maricopa County, Arizona, and as the official executor of the subject sentence of incarceration, was named as respondent in the underlying Federal Habeas Corpus action.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in this proceeding on May 7, 1999, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum Opinion of the Court of Appeals (unpublished) and the Order of the District Court for the District of Arizona (unpublished), appear as Appendices A and B respectively. Affirmance of state trial court conviction by the Arizona Court of Appeals, upon which state remedies were subsequently exhausted by denial of Arizona Supreme Court review, appears at *Hirschfeld v. Superior Court*, 908 P.2d 22 (App. 1995).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 7, 1999. This petition for certiorari is being filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The federal Habeas Corpus action case was brought under 28 U.S.C. §§ 2253, 2254.

Petitioner seeks to have the "***lessens the dignity and authority of the court***" catch-all provision of Arizona 17 A.R.S. Rules of Criminal Procedure 33.1,[1] found violative of the United States Constitution.[2]

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[1] **RULE 33.1** DEFINITION. Any person who wilfully disobeys a lawful writ, process, order or judgment of a court by doing or not doing an act or thing forbidden or required, ***or who engages in any other wilfully contumacious conduct*** which obstructs the administration of justice, or ***which lessens the dignity and authority of the court***, may be held in contempt of court. ***(emphasis supplied)***

[2] Rule 33.1 is not a statute, but a rule of criminal procedure, promulgated by the Arizona Supreme Court. Petitioner argued in state appellate proceedings that it exceeds the state-constitutional rulemaking power of any Arizona Court, to the extent that it imposes substantive

STATEMENT OF THE CASE

Habeas Petitioner Robert A. Hirschfeld, in 1995 a practicing Arizona attorney, is now disbarred as an indirect, or arguably direct, result of the subject conviction.[3] Hirschfeld was charged and convicted after trial of Criminal Contempt arising from a Domestic Relations action, for his purportedly excessive zeal in the representation of his client, a Joint Custodial Father from whom the vindictive Joint Custodial Mother was sequest ing their child.

Hirschfeld twice asked the mother in a loud voice, **"Please tell me where you are hiding my client's child."**

Hirschfeld's zealous First Amendment advocative discovery conduct, neither occurring in a courtroom nor during any court proceeding, resulted in a sentence of five nights in jail and $300 fine, arguably based on the locale (a vacant courthouse hallway). Barred from direct appeal of a Criminal Contempt conviction, Hirschfeld sought Special Action in the Arizona Court of Appeals, which for the first time declared a courthouse hallway to comprise a special

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penalties jeopardizing an accused contemnor's liberty interests by incarceration The Arizona legislature criminalized interference with judicial proceedings in terms which do not reach Hirschfeld's conduct. *See* A.R.S. §13-2810. *Post-hoc* application of non-statutory Rule 33.1 to Hirschfeld, creates a parallel, common-law crime reaching conduct that the legislature chose not to criminalize. Rule 33.1, construed to regulate the civility of out-of-court exchanges between adversaries, has ceased to regulate "practice and procedure in judicial proceedings." No Arizona Court has ruled upon Hirschfeld's repeatedly raised "exceeding rulemaking power" argument. Both Arizona's Court of Appeals and its Supreme Court ducked the issue. This Petition for Certiorari cannot and does not seek U.S. Supreme Court adjudication of exclusively State Constitutional limitation upon Rule 33.1. But inquiry into to federal constitutionality of the Rule remains jurisdictionally proper.

[3] *See* Petition for Certiorari No. 98-891, 11/23/98, *Hirschfeld v. Zlaket*, Cert. Den ___ U.S.___

protective zone in which criminal sanctions could be imposed upon First Amendment conduct. [4]. The conviction was affirmed in a split decision, with a very strong dissent by the Hon. Susan Ehrlich, criticizing substantial Constitutional defects in Rule of Criminal Procedure 33.1, facially and as applied. [5]

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[4] " `...there is substantial doubt that a court can, consistent with the right to free speech, impose a criminal penalty on ill-mannered or oppressive communications by an attorney to an adversary when the communications occur outside the court." [quoting majority opinion from] *Hirschfeld v. Sup.Ct.*, 908 P.2d 22,29 (Ariz. Ct. App. 1996).' We, therefore, need not contemplate that scenario. For our purposes, it is enough to note, as the state court of appeals did, that `that is not this case.' " *Hirschfeld v. Arpaio*, (the unpublished Ninth Circuit ruling which is the subject of this Petition for Certiorari, see Appendix A)

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[5] **"EHRLICH, Judge, concurring in part and dissenting in part.**

"I concur with the majority's acceptance of special-action jurisdiction. I respectfully disagree with its resolution of the substance of the case.

"The majority concludes that Hirschfeld's uncivil behavior toward the mother of his client's child in the corridors of the Maricopa County Superior Court was criminally contemptible because it constituted "contumacious conduct which lessens the dignity and authority of the court." See Ariz. Rule Crim. P.("Rule") 33.1. I disagree. Hirschfeld's actions clearly were intentionally offensive, unprofessional, (Note regarding ethical rule omitted) and opprobious, but they were not, to my mind, contumacious. I take particular issue with the majority's declaration that, under the "inherent" contempt power of the court, the term "contumacious" is accorded a broad definition. To the contrary, because the power to proclaim a person to be in criminal contempt of court invokes the independent authority of the judicial branch of government, the magnitude of that declaration dictates that the definition of the word "contumacious" be confined to describe actions impugning the dignity and authority of the court itself.

"Rule 33.1 invokes the inherent ability of the court to punish a violation of the court's "lawful writ, process, order or judgment," to punish "wilfully contumacious conduct which obstructs the

administration of justice," or "wilfully contumacious conduct ... which lessens the dignity and authority of the court.... ." Hirschfeld was not charged with obstructing the administration of justice. Had he been found in criminal contempt of Judge Hall's directive to "leave [the mother] alone," this court likely would have affirmed with alacrity. But Hirschfeld's contempt was not based upon disobedience to an order of Judge Hall but upon behavior of Hirschfeld "which lessen[ed] the dignity and authority of the court." In this case, that is too weak a post to support a criminal contempt lintel. There is no better proof of this weakness than the trial court's pervasive incorporation of Hirschfeld's disregard for Judge Hall's leave-her-alone directive as support for its and, now the majority's conclusion that Hirschfeld denigrated the "dignity and authority" of the court.

"The trial court's minute entry includes the following passages that crystallize the incorporative analysis in which it engaged.

> 'The evidence clearly shows that Judge Hall asked -- told Mr. Hirschfeld to leave the woman alone, and I understand and I realize that he is not being charged with wilfully disobeying the order of Judge Hall, but looking at all the activities involved here, Mr. Hirschfeld really just disregarded anything that Judge Hall said. He went outside the chambers area of Judge Hall's court and other courts, began harassment, haranguing, and badgering ...[Emphasis added].'
>
> 'His actions lessened the dignity and authority of the court. He disregarded the request of Judge Hall. He harassed [the mother] to the point that she was in tears and upset and in fear, and I find that this shows beyond a reasonable doubt that he wilfully engaged in contumacious conduct .... [Emphasis added]'

"The tenor of these comments is marked by its repeated contextualization of Hirschfeld's actions as being in disregard for Judge Hall's order or directive. But Rule 33.1 is tripartite in nature. The significance of the divided nature of the rule is underscored in this case because of Judge Hall's repeated avowals that Hirschfeld's conduct was neither an obstruction of the administration of justice nor a disobeyance of an order. Accordingly, Hirschfeld's actions must be analyzed only in the context of the "dignity and authority of the court" because that is all with which Judge Hall charged him. Therefore, to be guilty of criminal contempt, Hirschfeld had to engage in conduct diminishing the dignity and authority of the court but not causing an obstruction to the

administration of justice nor violating a court order. The words "dignity" and "authority" are joined by the conjunctive "and".

"As the majority notes, "'contumacious' means 'obstinately resisting authority; insubordinate; disobedient.'" citing *Webster's NewWorld Dictionary*, Second College Edition, 1982. The *Random House Dictionary of the English Language, Unabridged*, 443 (2d ed. 1987) concurs, adding only "stubbornly perverse or rebellious; wilfully and obstinately disobedient." *The Oxford English Dictionary* (1933, 1971) provides "1. Contemning and obstinately resisting authority; stubbornly perverse, insubordinate, rebellious. ...2. Law. Wilfully disobedient to the summons or order of a court." Based upon these definitions, reflective of the history of the contempt power, I believe that Hirschfeld correctly states that contumacious conduct requires a direct and immediate challenge to the court's authority which could not be allowed to pass if the court were to maintain control of its proceedings. To interpret the term in any other manner, I fear, would be to improperly extend to contempt power, a power which the United States Supreme Court has consistently noted "uniquely is 'liable to abuse.'" *International Union, UMWA v. Bagwell*, __ U.S. __, ___, 114 S.Ct. 2552, 2559 (1994) (citing *Bloom v. Illinois*, 391 U.S. 194, 202 (1968), quoting *Ex Parte Terry*, 128 U.S. 289 (1888)

> "Note: The majority's attempt to finesse the definitional problems it faces with the term "contumacious by likening it to the word "contumely" is precisely the overextension with which I am concerned. The nouns "contumacy," from which "contumacious" is derived, and "contumely," while linguistically related, each bear a distinct definition. Had the drafters of Rule33.1 intended to punish merely "haughty and contemptuous rudeness," or "insulting and humiliating treatment or language" they would have used the phrase "contumelious conduct", not "contumacious conduct."

"Hirschfeld's words and actions were directed toward the mother of his client's child; they were intended to cause her to tell him the location of the child who was the focus of an apparently bitter custody dispute. There is nothing in the record, again in the absence of Judge Hall's directive to "leave her alone," indicating that Hirschfeld intended his actions as a stubborn rebellion or obstinate resistance to the authority of the court.

"The majority counters this by reference to *United States v. Patterson*, 26 F. 509, 511 (Tenn. Cir. 1886), wherein the court held that

fighting in the courtroom, even during a recess of the court, was an attack upon the court's dignity. The majority simply stretches the reasoning of the case to cover those areas "adjacent to" the courtroom and ignores the phrase in Rule 33.1 "and authority of the court." Additionally, the majority's claim that, "at some point, conduct violates a standard that all can assume the court has set for those who are in attendance upon the court" is simply too tenuous.

> "NOTE: Equally gossamer, and of questionable relevance, is the majority's illustration of Hirschfeld's violation of the "assumed" standard of conduct. The [Arizona] supreme court made it clear in its [bar suspension] order of June 7, 1995, that its "conclusion is reached apart from the resolution of the legal challenges advanced by [Hirschfeld] to the trial court's finding of criminal contempt and the sentence imposed."

"Certainly, as in *Patterson*, fighting in the courtroom is assumed to be violative conduct. But that lies as much in the fact that fighting in any public area is forbidden. The use of mere words, or even words accompanied by pursuit of the person to whom they are being addressed, outside of the courtroom and outside the hearing of the judge, does not easily square with such an assumption. A lawyer other than Hirschfeld, a mother with a different personality, a mother represented by counsel, all are variables that could have rendered the actions in the underlying case simply another interaction in the courthouse and not the crux of a criminal contempt proceeding. To hold this particular lawyer liable for criminal contempt for his uncivil behavior, without connecting that conduct to a more direct challenge to the court's authority, constitutes an abuse of the contempt power and a rejection of the principle that the contempt power should be used with caution. *E.g., In Re Matter of Little,* 404 U.S. 553, 555 (1973)...."

Dissent, Ehrlich, J. ***Hirschfeld v. Superior Court***, 908 P.2d 22 (App. 1995)

(End Footnote 5)

In the Criminal Contempt Trial, there is a record of substantial conflicts in sworn testimony between prosecution witnesses, necessarily constituting perjury on the part of some, since the conflicted statements could not simultaneously be true. Although this is pointed out in the Federal Court record, which included the state trial transcripts, the Ninth Circuit opinion mistakenly claims that Hirschfeld presented *no* factual evidence in seeking federal Habeas Corpus to support factual or evidentiary trial court error.

For example, the Custody-litigant mother who was the purported "victim", truthfully testified that Appellant had not come near her, nor communicated with her after the twice-repeated discovery questioning he had attempted in the hallway. Her mysterious male companion, apparently her legal coach, was probably a source of the strategy of knocking Hirschfeld out of continuing representation. Attorney Hirschfeld, eight years earlier, had won joint custody for the father-client in the face of false allegations by the mother of sexual molestation. Mother wanted to destroy that Joint Custody and was understandably distressed, even hysterical, at the prospect of facing Hirschfeld again.

The companion/coach perjuriously stated that Appellant had made threatening remarks, pointed fingers, and done various acts ***which could not have been true*** in light of the purported victim's witness-stand account of what happened. Yet Judge Ryan, apparently intent on achieving a *sub-rosa* basis for triggering disbarment of Hirschfeld, "found" that the nonexistent "harassment" falsely described by the non-credible companion/legal coach had occurred.

Ryan sentenced Hirschfeld to jail for what the Arizona Court of Appeals majority described as "rude and harassing behavior" towards an opposing party while court was in

recess.[6] The environs of the courthouse were vacant, as it was near the 5:00 PM closing time, and Judge Hall was completely unaware of anything alleged to have happened after the non-charged initial hallway questioning, until the hysterical mother and her mysterious companion/advisor burst into his chambers and she tearfully complained of alleged "stalking and harassment".

The conduct in question occurred outside the courtroom and outside the presence of the judge. Hirschfeld was not charged with violating a court order nor with obstructing the administration of justice. He was convicted *only* of violating the portion of the Arizona criminal contempt rule which prohibits "*willfully contumacious conduct...which lessens the dignity and authority of the court*

The issue before the Court of Appeals was whether behavior between litigants which a court found to be rude and harassing, but which was not directed at the court itself, is punishable as criminal contempt. The Arizona Court of Appeals majority held that it is. The majority's rationale was that the contempt power extends to protecting people, outside the courtroom and beyond presence of the judge, during their departure from a court building, from "rude and harassing behavior."

"He [Judge Hall] said to Hirschfeld, 'Leave her [Amy Williams] alone,' and then, 'We'll take care of this at ten o'clock.'" There was indeed evidence that Judge Hall said something akin to "leave her alone."

Neither Hirschfeld nor his client recalled hearing whatever remark to that effect Judge Hall believes that he made. Judge Hall explicitly stated, both when interviewed and at trial, that Hirschfeld was not being charged with having disregarded an order to leave Amy Williams alone..

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[6] id., *Hirschfeld v. Superior Court*, 908 P.2d 22, App. 1995)

The testimony of the accusing witness, Amy Williams, was that Hirschfeld never touched her, and that he asked her once or perhaps twice where the child was, as they were leaving Judge Hall's chambers, but that he did not ask her again. (Tr. 4/21/95 at 67-68, 76, and generally.) The Federal District Court's statement, at Appendix B, p. 2, lines 16-20, is directly contrary to the mother's testimony. It is not clear what was supposedly done "in an abusive and harassing manner.

REASONS FOR GRANTING THE WRIT

I.
Arizona Rule of Criminal Procedure 33.1, to the extent that it criminalizes *"wilfully contumacious conduct ... which lessens the dignity and authority of the court"* is unconstitutionally vague or overbroad

The Arizona Special Action Court majority's opinion appears to authorize judges to punish incivility between litigants on the basis of subjective, varying standards of civility which can be applied only in unpredictable ways, thereby invoking Federal Constitutional Questions of vagueness and overbreadth.

I.(a)
THE CRIMINAL CONTEMPT RULE IS UNCONSTITUTIONALLY VAGUE

No prior Arizona decision had addressed whether purportedly "uncivil" conduct between litigants out of the presence of the court can be punished as criminal contempt. The Arizona Court of Appeals majority found that cases from other jurisdictions reached differing answers to the

question. No Arizona legal practitioner, including Hirschfeld, had any standard by which to predict the limits of courthouse advocacy.

To domestic relations attorneys accustomed to seeing their own clients aggressively questioned, or themselves as counsel being thus questioned in courthouse hallways by opposing counsel with impunity over a decade of practice, the limits are by no means obvious or apparent.[7]

The proper boundaries of the contempt power have been the subject of significant litigation and scholarly commentary in recent years.[8] The contempt power must reach far enough to protect the courts from assaults on their authority. It must not, however, reach so far as to chill the vigorous advocacy that is required for our system to function properly.

Arizona Court of Appeals Judge Ehrlich in her dissent accurately summarized Hirschfeld's central position:

> "...I believe that Hirschfeld correctly states that contumacious conduct requires a direct and immediate challenge to the court's authority which could not be allowed to pass if the court were to maintain control of its proceedings. To interpret the term in any other manner, I fear, would be to improperly extend the contempt power, a power which the United States Supreme Court has consistently noted 'uniquely is "liable to abuse."' (See footnote 4, supra)

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[7] "Objections to vagueness under the Due Process Clause rest on lack of notice, and hence may be overcome in any specific case where reasonable persons would know their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. (citations omitted) *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)

[8] See generally L. Raveson, "*Advocacy and Contempt--Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*," 65 Washington Law Review 743 (1990).

The Special Action majority concluded, by contrast, that conduct which was not directed towards the court at all, but rather towards another litigant, could be punished as contempt.

The contempt power, reflected in Rule 33.1, exists to protect the authority of the court. It does not exist to protect the sensibilities of litigants during out-of-court exchanges. Hirschfeld was convicted under the vaguest portion [9]of Rule 33.1, Arizona Rules of Criminal Procedure: "lessening the dignity and authority of the court." Given the purpose of the contempt rule, that standard should be limited to conduct which is directed at the court's dignity and authority. Hirschfeld's conduct indisputably was not. If there are to be restrictions on incivility between litigants, they should not be established through retroactive, tortured extensions of rules which were designed to serve other ends.

I(a)(i)
If Rule 33.1 Reaches Exchanges Between Litigants, It Violates Due Process of Law

While the void-for-vagueness doctrine is most commonly applied to criminal statutes, it is applicable whenever the law attempts "the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1924) (rejecting contention that void-for-vagueness doctrine was limited to criminal statutes).

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[9] While not factually chargeable to the *Arizona conduct* herein, compare the clear, explicit warnings to potential contemnors given by the excerpted wording of *California Code of Civil Procedure* §1209(a)(7): **"Acts or Omissions constituting [Contempt]** (a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:...(2) A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding...(7) Unlawfully detaining a witness, or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial.

"A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Village of Hoffman Estates, et.al., v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982)

"The need for definiteness is greater when the ordinance imposes criminal penalties on individual behavior or implicates constitutionally protected rights than when it regulates the economic behavior of businesses. *Hoffman Estates*, 455 U.S. at 498-99, 102 S.Ct. at 1193-94" *Nunez v. City of San Diego*, 114 F.3d 935 (9th. Cir. 1997) *See also: United States v. Lanier*, 117 S.Ct. 1219 (1997)[10]

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[10] "An accused has the right to a fair warning, in language that the common world will understand, of what the law intends to do if a certain line is passed; to make the warning fair, so far as possible the line should be clear; the principle is that no one shall be held criminally responsible for conduct which the person could not reasonably understand to be proscribed; also, the requirement of fair warning reflects the deference due to the legislature; there are three related manifestations of the requirement of fair warning, in which manifestations (1) the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at the statute's meaning and differ as to the statute's application, (2) the canon of strict construction of criminal statutes--or rule of lenity--insures fair warning by so resolving ambiguity in a criminal statute as to apply it to only conduct clearly covered, and (3) although clarity at the requisite level may be supplied by judicial loss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within the statute's scope; in each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *U.S. v. Lanier*, 520 U.S. 259; 117 117 S.Ct. 1219; 137 L.Ed. 2d 432; 65 U.S.L.W. 4232; 97 *Cal. Daily Op. Serv.* 2350; 97 *Daily Journal DAR* 4168; 10 *Fla. Law W. Fed. S* 388 (1997)

Neither Appellant nor any other advocate could have known from Rule 33.1, Arizona Rules of Criminal Procedure, that in discussions with an adversary, persistence and aggressiveness could at some point become a jailable offense.[11]

The Federal District Court was obligated to independently determine, under Federal Constitutional standards, whether "The language in the Rule conveyed 'sufficiently definite warning as to proscribed conduct when measured by common understanding and practices' " *Roth v. United States*, 77 S.Ct. 1304, 1312-13 (1957). However, the District Court seems only to have fallen back on what is arguably a biased assessment in the State Court system. Notwithstanding the trumped-up factual claims of "stalking" or "harassing", a fair federal evidentiary presentation would have shown that Hirschfeld's alleged aggressive questioning conduct is commonly applied *to fathers* by *mothers' attorneys* in the Maricopa County Courthouse hallways, and was in fact a "common understanding and practice." The State Appellate *post-hoc* creation of a "protective zone" in hallways newly chills proper, though aggressive, pretrial seeking of pertinent, discoverable truth by counsel.

Hirschfeld had no reasonable expectation that the hallway seeking of emergency information regarding the mother's "hiding" of a child (who was at that time scheduled to spend two weeks in the father's physical custody), was any different from the identical inquiry which would routinely be

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[11] "An attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of the controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth." (citation omitted). *In re Kirk*, 641 F.2d at 687." *U.S. v. Thoreen*, 653 F.2d 1332; (Ninth Cir., 1981)

made if a father were "hiding" himself and a child, from a mother entitled to joint-custodial possession of the child.

A father tearfully complaining to a judge that the mother's counsel was "stalking and harassing" him in identical circumstances, would probably be laughed out of the judge's chambers.

Hirschfeld's First Amendment rights reinforce the client's rights. These comprise rights to effective counsel, to discovery, to due process, to preparation for the rush-job custody modification hearing scheduled next morning, to his lawyer's zealous advocacy. As the beleaguered client's attorney of record, Hirschfeld was also asserting his client's First Amendment Rights.

As applied to Hirschfeld, the "dignity-and-authority" language of Rule 33.1 has become a means of enforcing unstated norms of decorum and civility in discussions between adversaries, out of the presence of the judge. Appellant had no fair warning from the rule that this might occur. *See Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1048 (1991) (ethical rule concerning statements about pending matters gave attorney "no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated," and therefore void for vagueness). To the contrary, a great deal of Arizona law suggests that conduct must somehow obstruct the administration of justice to be punishable. *See* A.R.S. §12-864 (defining contempt as conduct in the presence of the court "or so near thereto as to obstruct the administration of justice"). *See also* A.R.S. § 13-2810 (crime of interference with judicial proceedings encompasses conduct "during the session of a court which directly tends to interrupt its proceedings or impairs the respect due to its authority").

"Because the limits of condonable advocacy and the standards for defining contempt are at best imprecise, whether an attorney is on notice that conduct is within the prohibition of contempt laws is critical.[12]" The absence of such notice here renders the conviction violative of due process.

The Arizona Court of Appeals, and the federal Ninth Circuit Court of Appeals Opinion (Appendix A), suggest that the standards for the contempt rule can be found in the Arizona Rules of Professional Conduct. "[Hirschfeld's] conduct violated a pre-set standard, the parameters of which attorneys are presumed to know")). This was a criminal prosecution, not a disciplinary proceeding. The Rules of Professional Conduct were never intended as a standard for criminal contempt of court. The Arizona Supreme Court itself has suggested that the standards are different. [13]

Hirschfeld may have had to answer to the Rules of Professional Conduct in the proper forum, indeed, but those rules have nothing to do with whether the conduct at issue constitutes criminal contempt. Moreover, the law governing contempt of court, and the rule established by the Court of Appeals opinion, apply equally to lawyers, clients, pro se litigants, witnesses and mere observers. The opinion does not even suggest what standards of civility will apply to those who are not Lawyers. The cases relied upon in the Special Action majority opinion, and more importantly, in the Ninth Circuit Opinion, all appear to have involved either (1) physical altercations (2) intimidating conduct towards witnesses or jurors, who uniquely require protection, or (3) direct contempt in the courtroom during ongoing

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[12] L. Raveson, Supra, cited in note 6, at. 801

[13] Order of June 7, 1995, in Arizona Supreme Court SB-95-0033-D, relating to suspension of Petitioner from practice.

proceedings, for which summary procedures apply.[14] 'm(.U[15] Cases in which no contempt was found all lacked these elements. Those cases are not so much "contrary" as distinguishable. So is this case, and for the same reasons. By criminalizing purely verbal, out-of-court conduct towards an opposing party, the Arizona Court of Appeals majority has given the contempt power an expansive reach without precedent.

I(b)
THE CRIMINAL CONTEMPT RULE IS UNCONSTITUTIONALLY OVERBROAD

Rule 33.1, as construed by the Arizona Court of Appeals majority, also permits arbitrary and discriminatory enforcement.

> "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

> "The void-for-vagueness doctrine incorporates several important due-process principles. (notes omitted) It requires that a law give fair notice of its mandate. '[B]ecause we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity

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[14] *Pounders v. Watson*, 521 U.S. 982, 117 S.Ct. 2559 (1997), does not, as the Ninth Circuit opinion asserts, cite on-point examples of proscribed outside-the-courtroom attorney conduct.

[15] "Where misconduct occurs in open court, the affront to the court's dignity is more widely observed, justifying summary vindication. (citations)" *Pounders v. Watson*, id., 117 S.Ct. at 2362 (1997),

> to know what is prohibited, so that he may act accordingly.' *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972), 108-09 (1972).' *Finley v. National Endowment for the Arts*, 100 F. 3d 671 (9th Cir. 1996)

The question is not whether discriminatory enforcement occurred here, but "whether the Rule is so imprecise and overbroad that discriminatory enforcement is a real possibility." *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (finding Nevada ethical rule constraining attorneys' statements about pending proceedings void for vagueness).

Because there are no standards to apply except for different judges' views of what is civil, what might be tolerated from a pillar of the bar will send a less popular lawyer to jail. *See also Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Jellum v. Cupp*, 475 F.2d 829 (9th Cir. 1973) (invalidating criminal statute which contained no discernible standards on the basis of Giaccio).This is not an instance where verbal or expressive conduct violated the clearly stated wording of any statute (or procedural rule), as was the case in the District Court's cited (Appendix B) *Melugin v. Hames*, 38 F.3d 1478, 1482 (9th Cir. 1994). *Melugin's death threat* clearly fell within the prohibitions of Alaska's Criminal Statute, Arizona's Rule of Criminal Procedure 33.1 had, at the time of Hirschfeld's advocative courthouse conduct, no "incorporated definitions" or on-point case law.

> "I agree with the majority that the statute under which Melugin was convicted was not unconstitutionally vague, and that it was intended to apply to the type of conduct engaged in by Melugin. I also agree that a jury could properly find that Melugin's communication was a 'true threat'. Where I differ respectfully from the majority is in the matter of facial overbreadth. In my view, AS section 11.56.510(a)(1), when read in the light

> of its incorporated definitions, in sections 11.81.900(b)(55) and 11.41.520 is unconstitutionally overbroad on its face. Unlike the majority, I do not believe that the statute was sufficiently narrowed by the Alaska Court of Appeals." CANBY, Circuit Judge, dissenting, *Melugin v. Hames*, id., 38 F.3d 1478, 1488 (9th Cir. 1994).

Circuit Judge Canby's dissent goes on to point out numerous examples of unconstitutional overbroadness, under *Wurtz v. Risley*, 719 F.2d 1438 (9th Cir. 1983). The undefined catch-all "willfully contumacious conduct...which lessens the dignity and authority of the court" has an even broader scope than posited by Judge Canby, and therefore invites abuse in situations where prosecutors and triers of fact may be desirous of finding a way to provoke disbarment of a targeted attorney.

Although the underlying facts were strongly disputed, Hirschfeld acknowledged that they were to be construed most strongly against him for purposes of State appellate review. In this Habeas Corpus action, the District Court was requested to view with skepticism the contorted finding of facts by Judge Ryan, and the procedural defects, as well as the pervasive atmosphere of animus, bias and prejudice amongst witnesses, judicial administrators, and judges in which the conviction was procured.

The courthouse is a place where litigants can reasonably expect to be questioned. The "dignity and authority of the court" are inextricably tied to the expectation that the truth will be sought within the courthouse. Appellant's behavior, even if the false claims of following or subsequent aggressive questioning are, arguendo, presumed true, cannot be characterized as anything other than diligent pursuit of the truth.

Judicial notice may be taken that the environs of Domestic Relations courtrooms are so highly charged, emotionally, that it is commonplace to see crying parents. Such courtrooms are routinely equipped not only with water fountains, but also with witness-stand boxes of tissues. A mother who was, eight years before, angry and tearful that she had been forced to abandon her quest for exclusive power and sole custody, might reasonably be expected to be distraught at the prospect of once again having a truth-seeking process deny to her a maliciously planned destruction of eight years of joint custody. But the "dignity and authority" of the court does not crumble when such a mother cries. There is no "plain language" in the final clause of Rule 33.1 even remotely giving warning that it comprises a nebulous "duty to protect litigants, witnesses, attorney and jurors from abuse and harassment when they are in or near the courtroom."

A *post-hoc* determination in state court that properly intense questioning outside the courtroom "offends its dignity" when identical persistence in questioning on the witness stand is routinely countenanced, still defies clear definition of the boundaries of permissible advocacy. Such uncertainty chills all lawful advocacy. Should a state court wish to muzzle future hallway questioners, it may promulgate clearly defined limits of such questioning. But to apply any such standard retroactively to one who had no such notice, and to sentence him to any incarceration at all, should be declared unconstitutional.

I(b)(i)
If Rule 33.1 Reaches Exchanges Between Litigants, It Impermissibly Chills Protected Speech

There can be no doubt that vague threats of contempt tend to chill the vigorous advocacy that is required for our system to function properly. "[W]hen a court considers punishing

advocative expression, not only are first amendment freedoms implicated, but rights under the fifth, sixth, and fourteenth amendments, and the proper functioning of the judicial branch are as well." *Raveson,* id., at 772.

No matter how the Ninth Circuit opinion attempts to justify the "dignity and authority" language as applied to Hirschfeld, Rule 33.1's overbreadth must be tested facially as to everyone.[16]

The Ninth Circuit opinion correctly states that the federal court, "in evaluating a facial challenge to a state law," "must ... consider any limiting construction that a state court or enforcement agency has proffered."[17] But if the meaning of the statute or rule attributed by the state court is authoritative, that does not hinder the federal court in examining and ruling, within the state-defined meaning, upon the statute's unconstitutionality.

The conduct for which Hirschfeld has been sentenced to jail was advocative. He was not questioning Amy Williams about the whereabouts of the child out of personal interest, but as his client's advocate. He did not touch her. He did not threaten her. He did not use foul language. He questioned her about an indisputably relevant matter. This became a crime, apparently, because of disputed findings that

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[16] "As we put it in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. at 462, he `attacks the validity of [the statute] not facially, but as applied to his acts of solicitation,' `whereas the person invoking overbreadth `may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him,' *id.* at 462, n.20....Where an overbreadth attack is successful, the statute is obviously invalid in all its applications, since every person to whom it is applied can defend on the basis of the same overbreadth.....Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to *someone else*". *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482-483 (1989)

[17] *Kolender v. Lawson*, 461 U.S. 352, 355 (1983)

Hirschfeld's tone of voice was rude and that he *(arguendo)* "followed Amy Williams" so as to question her some more.

There is little doubt that the twice-asked question, **"Please tell me where you are hiding my client's child"** could have been properly asked while Amy Williams was being cross-examined on the witness stand, at a scheduled deposition, or, for that matter, in encountering Ms. Williams on the street. A mother who is herself seeking the court's approval of her sequestration of a child in violation of an existing joint custody order, would reasonably expect to be asked such a question in an adversarial situation. It is therefore unreasonable to place a time, place or manner restriction burden upon Petitioner's First Amendment rights in a vacant court hallway while no court proceeding was in progress. Amy Williams' perception of Petitioner's mere presence as "harassment" should not meet the burden of proving Criminal Contempt.

The Arizona Court of Appeals took it as self-evident that litigants should be protected from rudeness, incivility and excessive persistence. Such a premise is far from self-evident. One reason is that even uncivil speech has value. Patrick Henry's words no doubt seemed rude and uncivil from the perspective of London. Litigation adversaries who are communicating may resolve their differences, even if some of the communication is ill mannered or overly persistent. Silence, by contrast, has no tendency whatsoever to resolve differences. A second problem with criminalizing rudeness and incivility is that the line between what is permitted and what is not cannot be clearly or fairly drawn. The very attempt carries with it a high risk of cultural discrimination. Norms of civility differ from culture to culture and from neighborhood to neighborhood. As with obscenity, we think we know incivility when we see it, but parties and lawyers cannot know when a judge will decide that he or she sees it. Uncertain boundaries in the law

inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

The uncertain contours of the rule established by the Arizona Special Action majority's opinion are to some extent made evident by the Special Action opinion itself. For example:

> "We agree with Hirschfeld that there is substantial doubt that a court can, consistent with the right of free speech, impose a criminal penalty on ill-mannered or oppressive communications by an attorney to an adversary when the communications occur outside court. But that is not this case. This case is about maintaining the peace on the hallway outside the courtroom and protecting persons who are actually in attendance on the court."[18]

Should speech really be less free in the halls of the courthouse than elsewhere? The Arizona Special Action majority opinion says yes, and creates an ill-defined sphere of sanctuary, in or around the courthouse, against unwelcome speech. It is not clear whether such sanctuary extends to the cafeteria, past the metal detectors, or onto Jefferson or First Avenue in Phoenix, where the Maricopa County Superior Court building stands. Not only are the geographical contours of the rule uncertain, but so is its content. What constitutes "ill-mannered or oppressive communications by an attorney to an adversary"? What, if anything, distinguishes criminally ill mannered communications from the ordinary excesses which are unfortunate but inevitable in an adversary system? Attorneys and litigants can know the answers only after they are charged and tried. There are no standards other than

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[18] Majority Opinion, *Hirschfeld v. Superior Court*, id. 908 P.2d 22, 29 (App. 1995)

those which reside in the minds of the various judges. Those are neither uniform nor ascertainable. Where the line between vigorous representation and contempt is unclear, doubts should be resolved in favor of vigorous advocacy. *See United States v. Oliver*, 470 F.2d 10, 13 (7th Cir. 1972) (reversing contempt conviction for remarks critical of the court in the presence of a jury); *United States v. Thoreen*, 653 F.2d 1332, 1339 (9th Cir. 1981). The Special Action opinion of the Arizona Court of Appeals does the opposite. [19]

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[19] "In dealing with an attorney's contempt, the Supreme Court noted in *In re McConnell*, 370 U.S. 230, 236, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1961): While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom . . . it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice. . . . 370 U.S. at 236, 82 S. Ct. at 1292; *In re Dellinger*, 461 F.2d 389 at 397; see also *United States ex rel. Robson v. Malone*, 412 F.2d 848, 850 (7th Cir. 1969).

"Accordingly, this court has required that lawyers be given "great latitude" and "extreme liberality" in the area of vigorous advocacy. In *Dellinger* the court stated:

"Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting on their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows. Id. 461 F.2d at 400.

"Furthermore, the court thought that in close cases where the line between vigorous advocacy and actual obstruction defied strict delineation, doubts should be resolved in favor of vigorous advocacy. Id. 461 F.2d at 398.

"In view of this "extreme liberality" afforded trial counsel in their representation of clients, and resolving any doubts in favor of vigorous advocacy, we do not think that the conduct charged in the first

specification rises to the level of "misbehavior" necessary to support a contempt citation.

"Oliver's question was related to defendants' proffered theory of defense and touched on the insane "preceptions" and "delusions" which the defendants claimed to have held prior to making the raid on the draft board files. The finding that the questions were asked deliberately is at least ambiguous. We disagree with the government that Oliver's conduct amounts to a "palpable obstruction," sufficient without the element of intent. Unless the conduct of the spectators can be attributed to him, Oliver cannot be held responsible for their conduct. Furthermore, the lack of any finding by the district judge that Oliver knew or should have known that the questions exceeded the bounds of conduct appropriate to his role as trial counsel we think substantiates our view that Oliver's conduct did not exceed the "outermost limits" of vigorous advocacy.

"It is not enough that the questions were provocative or inflammatory. If lawyers were barred from asking provocative and penetrating questions at trial merely because they may provoke or inflame, then an essential goal of every fact finding process -- the discovery of truth -- would indeed be thwarted. In any trial where emotions run high, we think it inevitable that some questions will provoke witnesses or spectators or inflame their passions. And we are not persuaded that the questions were not founded in the evidence under defendants' theory. But even if it was evidentially improper, we see no reason why the trial judge could not -- by use of the least power necessary -- have stricken it from the record with an appropriate instruction to the jury to disregard the question. Nor is it enough for the government to argue that Oliver engaged in a "strategy of misconduct." The government concedes that each act was insufficient in and of itself to warrant disciplinary action. This supports our view that Oliver's conduct was not beyond the outer bounds of zealous advocacy.

"We hold that the record does not "clearly show" that the conduct cited in the first specification of the contempt order was conduct so inappropriate to Oliver's role as trial counsel as to exceed the "outermost bounds" of vigorous advocacy. *U.S. v. Oliver*, 470 F.2d 10 (7th Cir. 1972)

An attorney possesses the requisite intent to be guilty of contempt only if he knows or reasonably should be aware in view of all the circumstances that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth. *In re Dellinger*, 461 F.2d 389, 400 (7th Cit. 1972), cert. den. 410 US 970, 93 S.Ct. 1443, 35 L.Ed 2d 706 (1973)[20]

II

Imposition of *any* incarceration upon an attorney for aggressively exercising First Amendment rights, or zealously pursuing client discovery duties, *solely because that exercise is within, rather than outside the environs of a courthouse*, offends Amendment 8, United States Constitution.

Incarceration for what is arguably adherence of Hirschfeld to his attorney-client duty, to diligently discover pertinent litigative information, is cruel and unusual punishment which had the draconian additional effect of resulting in

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[20] "Where, as here, the conduct complained of is that of an attorney engaged in the representation of a litigant, the search for these essential elements of the crime of contempt must be made with full appreciation of the contentious role of trial counsel and his duty of zealous representation of his client's interests." *In re Dellinger*, id., 461 F.2d 397

"Appellate courts must ensure that trial judges (or the jury on remand) are not left free to manipulate the balance between vigorous advocacy and obstructions so as to chill effective advocacy when deciding lawyer contempts. Admittedly the line defies strict delineation (Goldfarb, *The Contempt Power*, 172 (1971)), but by our resolving doubts in favor of advocacy, an independent and unintimidated bar can be maintained while actual obstruction is dealt with appropriately." *In re Dellinger*, id., 461 F.2d 398

Petitioner's suspension and eventual disbarment[21] from practice, and also the client's loss of his attorney (and, as it turned out, his loss of the equal joint custody of his child while unrepresented, the apparent goal of the joint custodial Mother's tearful histrionics in claiming "stalking" and "harassment" to divest her ex-husband of his aggressive, effective counsel.)

In imposing sentence of incarceration, Judge Ryan effectively found "aggravation", relying in part upon the highly publicized and prejudicial fact of Petitioner's having been sanctioned in another domestic relations case $20,000 by Judge Alfred Rogers (next-door courtroom to Judge Hall and probable co-promoter of the criminal contempt charge against Hirschfeld). Said sanction, irrelevant to criminal contempt aggravation, was finally thrown out by the Arizona Court of Appeals, as a gross abuse of judicial discretion[22] and was a factual basis of Hirschfeld's Federal Civil Rights suit against Alfred Rogers, [23]now deceased.

To the extent that the conviction and sentence of incarceration arose from pure speech, that discovery speech was protected advocacy. *In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed. 2d 1473 (1959), an ethics, not criminal case, was decided on the evidence, in favor of a suspended lawyer who had publicly criticized a court or its ruling.

The Ninth Circuit opinion declared Eighth Amendment protection of Hirschfeld based upon "proportionality" to be unlikely, citing *Harmelin v. Michigan*, 501 U.S. 957 (1991), where a defendant was sentenced to life imprisonment without parole for a single incident of possessing a large quantity of cocaine. But Hirschfeld did not, in the state

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[21] *See* Petition for Certiorari No. 98-891, id., 11/23/98, *Hirschfeld v. Zlaket*, Cert. Den.

[22] *Taliaferro v. Taliaferro*, 188 Ariz. 333, 935 P.2d 911 (App.1995)

[23] *Hirschfeld v. Rogers*, Pet. for Certiorari No. 98-642, 9/8/98, Cert. Den.

appeals nor federal habeas proceedings, complain that "five nights in jail" was "disproportionate to the offense." Rather, Hirschfeld has consistently challenged the nature of the penalty, *any incarceration at all*, as cruel and unusual for the arguably lawful hallway exercise of First Amendment advocacy. *Harmelin's* examination of the English Common Law roots of the Eighth Amendment focuses on the religious-persecution-based sentence of Protestant Cleric *Titus Oates* for perjury in 1685, which included not only a huge fine, repeated public confinements in the pillory, but also being whipped by "the common hangman" "from Aldgate to Newgate" and two days later "from Newgate to Tyburn", and finally, life imprisonment. At *Oates'* sentencing, Judge Jeffreys complained that death was no longer available as a penalty and lamented that "a proportionate punishment of that crime can scarce by our law, as it now stands, be inflicted upon him."[24] By way of the town-to-town protracted whippings, "The judges, as they believed, sentenced *Oates* to be scourged to death." [25]

Hirschfeld's incarceration jeopardy is small. Nor is Sheriff Joseph Arpaio "the common hangman." But, by analogy, "*five nights in jail*" was not the real objective of Arizona trial court Judge Michael Ryan and those who urged him on or who, as did the House of Lords in *Oates'* case, countenanced the unjust sentence.[26] It was, like *Oates'* scourging, intended to trigger a result to which Ryan lacked jurisdiction to sentence Hirschfeld: *suspension, disbarment*; the certain

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[24] *Second Trial of Titus Oates*, 10 How. St. Tr. 1227, 1314 (K.B. 1685) cited in . *Harmelin v. Michigan*, id., 501 U.S. 957, 970 (1991)

[25] 2 T. Macaulay, *History of England* 204 (1899) *Accord*, D.Ogg, *England In the Reigns of James II and William III*, pp. 154-166 (1984), cited in . *Harmelin v. Michigan*, id., 501 U.S. 957, 970 (1991)

[26] " 'Not a single peer ventured to affirm that the judgment was legal: but much was said about the odious character of the appellant,' and the Lords affirmed the judgment. 6 [McCaulay] at 140-141" cited in . *Harmelin v. Michigan*, id., 501 U.S. 957, 970 (1991)

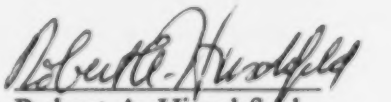
death of Attorney Hirschfeld's career as a passionate, effective Fathers Rights Lawyer.

The "line between vigorous representation and contempt" was much *less* likely to have been crossed herein, than in *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972). Yet a federal court strongly supported Mr. Dellinger's numerous, protracted, strong advocative actions, in the heat of trial, which most certainly were more likely to "offend the dignity and authority" of Judge Julius Hoffman's Chicago court than the seeking of simple discovery in a hallway, no matter what the mother's reaction.

The least possible power adequate to the end proposed should be used in contempt cases.[27]

CONCLUSION

The Supreme Court should grant Certiorari and thereafter remand the matter for further proceedings, including issuance of a Writ of Habeas Corpus by the District Court.



Dated August 4, 1999

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[27] *Anderson v. Dunn*, 6 Wheat. 204, 231, 5 L.Ed. 242 (1821)

APPENDIX A
(Ninth Circuit Memorandum)
Filed May 7, 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ALLEN HIRSCHFELD
Petitioner-Appellant,
v.
JOSEPH M. ARPAIO, Sheriff, ATTORNEY GENERAL FOR THE STATE OF ARIZONA,
Respondents-Appellees.

No. 98-15398

D.C. No. CV-96-0183-RGS

MEMORANDUM[1]

Appeal from the United States District Court
for the District of Arizona
Roger G. Strand, District Judge, Presiding

Argued and Submitted March 9, 1999
San Francisco, California

Before: O'SCANNLAIN and WARDLAW, Circuit Judges, and BYRNE ,[2] Senior District Judge

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[2] The Honorable Wm. Matthew Byrne, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

Robert A. Hirschfeld appeals pro se the district court's denial of his petition for relief under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Hirschfeld was convicted, after a hearing, of criminal contempt in violation of an Arizona rule of criminal procedure that prohibits "wilfully contumacious conduct ... which lessens the dignity and authority of the court." 17 A.R.S. Rules Crim. Proc., 33.1. The parties are familiar with the factual and procedural history of this case; therefore, we will not recount it here.

We review de novo the district court's denial of a petition for writ of habeas corpus. *See United States v. Cruz-Mendoza*, 147 F.3d 1069, 1071 (9th Cir. 1998) A federal habeas court must presume that state court factual determinations are correct unless there is evidence that the presumption would be unfounded. *See Langford v. Day*, 110 F.3d 1380, 1388 (9th Cir. 1997).[1] A habeas petitioner can rebut the presumption of correctness by establishing that his hearing in state court was not full, fair and adequate; that he was otherwise denied due process in state court; or that the state court's factual findings are not fairly supported by the record. *See* 28 U.S.C. § 2254(d)(6),(7),(8).

Hirschfeld first argues that all three exceptions apply to his case. He likewise urged the district court to view the state court's findings "with skepticism" because they were the result of bias and prejudice against him. Hirschfeld, however, has adduced no evidence to substantiate the challenges he raises, and our review of the record reveals none. The district court, therefore, properly accepted the state court's findings of fact. See Langford, 110 F.3d at 1388.

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[1] We cite pre-AEDPA law because Hirschfeld filed his petition before the effective date of the statute. See Jeffries v. Wood, 114 F.3d 1484, 1487 (9th Cir. 1997) (en banc).

Next, Hirschfeld complains that the Arizona Contempt rule is unconstitutionally vague as applied to his case. A statute is fatally vague when a person of average intelligence cannot reasonably understand what it prohibits. *United States v. Bohonus*, 628 F.2d 1167, 1173 (9th Cir. 1980). Objections to vagueness may be overcome where reasonable persons would know their conduct is at risk. *See Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).

Here, as the state court of appeals noted, Hirschfeld's actions violated professional and ethical codes of conduct, "a pre-set standard, the parameters of which attorneys are presumed to know." *Cf. Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991) ("lawyers in pending cases [a]re subject to ethical restrictions on speech to which an ordinary citizen would not be"). Moreover, his harassment of Amy Williams came immediately upon the heels of a judge's direct admonition to "leave her alone." We conclude that, under the same circumstances, a reasonably intelligent person would have known he risked censure. Hirschfeld's vagueness challenge, therefore, fails. *See Maynard*, 486 U.S. at 361.

Hirschfeld's third claim, that the contempt rule is overbroad, is also unsupportable. [2] A law is unconstitutionally overbroad if it "prohibits constitutionally protected conduct" *Gentile*, 501 U.S. at 1077 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972)) To render a statute unconstitutional, "overbreadth must be `substantial'" Id. (quoting *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 485 (1989)). And, "[i]n evaluating a facial challenge to a state law, a federal court must ... consider any limiting construction that a state court or enforcement agency has proffered." *Kolender*

[2] Although the district court did not address this claim, we conclude that it was adequately presented below, and that, as an issue of law, it is reviewable on appeal.

v. Lawson, 461 U.S. 352, 355 (1983)(internal quotations and citation omitted).

By its own terms, the Arizona rule at issue is not so sweeping as Hirschfeld complains it is. It proscribes a narrow class of speech, "wilfully contumacious conduct ... which lessens the dignity and authority of the court."

Moreover, the Arizona Court of Appeals construed the rule to avoid penalizing all contentious speech between litigants: "there is substantial doubt that a court can, consistent with the right to free speech, impose a criminal penalty on ill-mannered or oppressive communications by an attorney to an adversary when the communications occur outside the court." *Hirschfeld v. Sup.Ct.*, 908 P.2d 22,29 (Ariz. Ct. App. 1996). We, therefore, need not contemplate that scenario. For our purposes, it is enough to note, as the state court of appeals did, that "that is not this case." Hirschfeld pursued and harangued Williams in the hallways of the courthouse immediately after the judge told him to leave her alone. This conduct plainly falls within the ambit of the rule as construed by the court of appeals. And the conduct proscribed is similar to that which many states and tribunals have agreed are within the courts' power to curb. See *Pounders v. Watson*, 117 S.Ct. 2359, 2361-63 (1997) (citing cases). The Arizona rule is not overbroad.

Fourth, Hirschfeld asserts that his sentence of five evenings in jail is "cruel and unusual punishment" within the meaning of the Eighth Amendment. "[S]uccessful proportionality challenges outside the context of capital punishment `have been exceedingly rare." *Harmelin v. Michigan*, 501 U.S. 957, 963 (1991)(*quoting Rummel v. Estelle*, 445 U.S. 263, 272 (1980)). While Hirschfeld's sentence might seem severe, a brief review of the sentences imposed in other contempt cases shows that his sentence is neither so cruel nor unusual as to be unconstitutional. *See,*

eg., Pounders, 117 S.Ct. 2359 (two day jail sentence); *United States v. Lumumba*, 794 F.2d 806 (2d Cir. 1986) (three years probation conditioned on performance of 350 hours of community service); *In re Osborne*, 334 F.2d 611 (9th Cir. 1965) (ten days confinement).

Fifth, Hirschfeld complains that the district court's standard habeas corpus form denies pro se litigants due process because it does not describe the statutory avenues to rebutting the "presumption of correctness" that attaches to state court factual determinations in federal habeas proceedings. Instead, the form gives examples of claims aimed at rebutting the presumption.

We see no deprivation of due process here. Examples are likely more instructive to the typical pro se litigant than would be a recitation of the statutory exceptions. We note, moreover, that whatever due process concerns the form poses are mitigated here by the fact that Hirschfeld was a trained attorney, readily able to look up the relevant statute, 28 U.S.C. §2254, to which the form clearly directed him. In any event, we are satisfied that Hirschfeld received all the process he was due. As noted above, he specifically challenged the state court findings in the district court. His challenge failed because he adduced no evidence to support it.

Hirschfeld contends, finally, that the district court should have exercised pendent jurisdiction to consider sundry state law based challenges to his conviction. Again, he is wrong. A federal habeas court is limited to deciding whether a conviction violates the Constitution, laws or treaties of the United States. *See Reed v. Farley*, 512 U.S. 339, 346 (1994); 28 U.S.C. §2254(a) (1994). Thus, the District Court properly declined to address Hirschfeld's nonfederal claims.

AFFIRMED.

APPENDIX B
(District Court Order)
Filed Jan. 7, 1998
CLERK, US DISTRICT COURT
DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT A. HIRSCHFELD
Petitioner,
v.
JOSEPH M. ARPAIO, Sheriff,
Maricopa County, Arizona
THE ATTORNEY GENERAL
OF ARIZONA,
Respondents

No. CIV 96-183-PHX-RGS

O R D E R

Procedural and Factual History[1]

Petitioner represented husband/father in a child custody proceeding before Maricopa County Superior Court Judge Norman Hall. Petitioner, his client, and the mother met in Judge Hall's chambers where the mother was seeking a temporary custody order and the father was seeking an order for return of the child to the father. Judge Hall declined to consider the motions at that time and directed the parties to return the next day. Thus, the child was to stay with the mother pending the continuation of the hearing.

In the anteroom of Judge Hall's Chambers, petitioner asked the mother where she was hiding the child. The mother asked Judge Hall whether she had to answer and Judge Hall

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[1] The Court recites the facts found by the state court. The court's determination concerning credibility is presumptively correct. *Tomlin v. Myers*, 30 F.3d 1235, 1242 (0th Cir. 1994)

said that she did not. Judge Hall said to Hirschfeld, "Leave her alone... We'll take care of this at ten o'clock." Judge Hall returned to chambers and the parties left.

Petitioner, however, repeated, apparently in a loud voice, his question: Where was the mother hiding the child? The mother was disturbed by petitioner's repeated questioning. Instead of taking an elevator, the mother walked down the corridor. Petitioner's raised voice continue (sic) to be heard which panicked the mother.

Accompanied by a friend, the mother went into an empty room adjacent to a courtroom to avoid petitioner, fearful of additional harassment. Petitioner found the mother again and again demanded to know where the child was. The mother and her friend found their way back to Judge Hall's chambers. Two deputy sheriffs were summoned to chambers.

The first sheriff approached petitioner and requested identification. Petitioner stated that he had no identification and then demanded that the sheriff arrest the mother for custodial interference. The second deputy sheriff arrived and recognized petitioner. Petitioner and his client were escorted out of the courthouse.

The next day, Judge Hall cited petitioner for contempt of court pursuant to A.R.S. §12-864 and Rule 33.1, Arizona Rules of Criminal Procedure. Judge Hall specifically quoted the language in the statute that refers to one who "engages in any other wilfully contumacious conduct which lessens the dignity and authority of the court."

An evidentiary hearing was held before Judge Michael D. Ryan who found petitioner in contempt. Judge Ryan's oral order is found in Appendix C to the petition, Reporter's Transcript of Proceedings, May 8, 1995, at 2-5. Petitioner was sentenced to serve five nights in the custody of the

Maricopa County Sheriff. Appendix D, Reporter's Transcript of Proceedings, May 15, 1995 at 15.

Petitioner filed a Special Action in the Arizona Court of Appeals. In a split decision, the Court of Appeals affirmed the conviction. The Arizona Supreme Court declined Petitioner's petition for review. Petitioner now brings this petition for writ of habeas corpus. The matter having been fully briefed and oral argument heard, the Court finds and concludes that petitioner is not entitled to habeas corpus relief.

As a preliminary matter, the Court notes that although petitioner urges the Court to view the factual findings of the state court "with skepticism," it is well settled law that a state court's factual findings generally are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Melugin v. Hames*, 38 F.3d 1478, 1482 (9th Cir. 1994). Petitioner cites no law to support his position with respect to state court factual findings and does not rely on any of the exceptions to § 2254 which would rebut the presumption of correctness of various findings. Accordingly, the Court relies on the factual basis set forth in the state court proceedings.

State Law Claims

The Court notes that petitioner raises two purely state law issues in his petition for habeas corpus relief: (1) that the state court misconstrued Rule 33.1, Arizona Rules of Criminal Procedure; and(2) Rule33.1 exceeds the Arizona judiciary's rule making authority. A federal habeas court is limited to deciding whether a conviction violates the Constitution, laws or treaties of the United States. Reed v. Farley, 114 S.Ct. 2291, 2296 (1994). Federal habeas relief is not available for errors of state law. Estelle v. McGuire, 112 S.Ct. 475, 480 (1991) Nor is federal relief available for

alleged error in the interpretation or application of state law. Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1994).

Because petitioner has raised two purely state law issues, the petition for writ of habeas corpus will be denied as to the state law issues.

Federal Constitutional Claims

Petitioner also contends that Rule33.1, Arizona Rules of Criminal Procedure, is vague thereby violating the due process clause of the United States Constitution. Specifically, petitioner argues that the Rule does not provide notice of what behavior is contemptible; that the Rule has no standards to apply which results in arbitrary and discriminatory enforcement; that purely verbal, out of court statements should not form the basis of a finding of contempt; and that the language of Rule 33.1 does not plainly forbid any specific conduct.

Rule33.1, Arizona Rules of Criminal Procedure, states:

> Any person who willfully disobeys a lawful writ, process, order or judgment of a court by doing or not doing an act or thing forbidden or required, or who engages in any other wilfully contumacious conduct which obstructs the administration of justice, or which lessens the dignity and authority of the court, may be held in contempt of court.

Petitioner was found guilty of the third prong of the Rule, i.e., that petitioner engaged in "wilfully contumacious conduct...which lessens the dignity and authority of the court"

Void for Vagueness

Petitioner argues that Rule 33.1 is unconstitutionally vague. Hirschfeld contends that the phrases "contumacious" and "lessens the dignity and authority of the court" failed to give him sufficient notice that his conduct in chasing down the opposing *pro se* party in a litigation, loudly demanding an answer to his question, and generally harassing an unrepresented litigant, were prohibited or subject to sanction.

The Supreme Court in *United States v. Lanier*, 117 S.Ct. 1219 (1997), has outlined the vagueness doctrine. An act cannot be so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 1225. Although a court may interpret a statute to provide the "requisite level" of clarity, such an interpretation must not be so novel as to encompass conduct that "neither the statute or any prior judicial decision has fairly disclosed to be within its scope." Id. at 1224-1226.

In order to avoid unconstitutional vagueness, a statute must define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and establish standards to permit enforcement in a non-arbitrary and non-discriminatory manner. See Nunez v. City of San Diego, 114 F.3d 935, 940 (9th Cir. 1997). The "void-for-vagueness doctrine incorporates several important due process principles... `Because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give to the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" Finley v. Nat'l. Endowment for the Arts, 100 F.3d 671, 675 (9th Cir. 1996) (quoting Grayned v. City of Rockford, 92 S.Ct. 2294, 2298 (1972)). As the Grayned Court noted, "[a] vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers

of arbitrary and discriminatory application." 92 S.Ct. at 2299. The Finley court also observed that "[the twin dangers of a vague law -- lack of notice and arbitrary or discriminatory application -- may chill the exercise of important constitutional rights." 100 F.3d at 675.

The Arizona Court of Appeals found that petitioner's conduct "lessen[ed] the dignity and authority of the court" because the court has a right and the duty to protect litigants, witnesses, attorneys, and jurors from misbehavior and harassment while they are in or near the courtroom, whether they are arriving, waiting or departing. "Hirschfeld v. Superior Court, 908 P.2d 22, 25-26 (Az. Ct. App. 1995). The Court of Appeals further noted that "every person, and particularly every lawyer, is bound to know that no judge would authorize one party to abuse another in the manner done in this case when such abuse occurs in a place where the judge would be likely to observe it and would have the immediate authority to order that it cease." Id. at 28.

Petitioner attempts to place the offensive conduct in the context of normal litigation practice, specifically discovery. Petitioner (sic) characterization of the conduct, however, as mere discovery in a litigation context is unavailing. Reply at 7-8.

"Willfully contumacious conduct" is not an unconstitutionally vague term in the context of this statute. Although "contumacious conduct" may describe a number of behaviors in which parties and/or attorneys may engage, it is not so imprecise that discriminatory enforcement is a real possibility. See Gentile v. State Bar of Nevada, 111 S.Ct. 2720, 2732 (1991). Nor is the statute likely to have a chilling effect on some speech that is constitutionally protected for fear of violating the statute.

The language used in the Rule conveyed "sufficiently definite warning as to the proscribed conduct when measured

by common understand (sic) and practices." Roth v. United States, 77 S.Ct. 1304, 1312-13 (1957).

With respect to petitioner's challenge to the severity of the sentence, i.e., a $300.00 fine and five nights in jail, the Court finds that the sentence is not excessive and does not constitute cruel and unusual punishment based on the conduct charged.

Based on the foregoing,

IT IS ORDERED denying petitioner Robert A. Hirschfeld's petitioner (sic) for writ of habeas corpus.

IT IS ORDERED directing the Clerk of the Court to enter judgment in accordance with this Order.

FURTHER ORDERED vacating on January20, 1998, the stay that was previously imposed in this matter.

DATED this 5th day of January, 1998.

HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE